Public Health Law Program

LEGAL PREPAREDNESS FOR PANDEMIC FLU

WHAT ROLE CAN AND SHOULD EMPLOYERS PLAY IN RESPONDING TO A PANDEMIC FLU?

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I. Introduction

The potential for a pandemic flu has drawn tremendous media coverage in recent months. The virus that most scientists fear could create a pandemic is the "Avian Influenza A" (H5N1 or Bird Flu) virus. Currently, the virus cannot be easily transmitted from human to human. Nearly all cases of human infection have occurred in individuals (children and young adults) who have close contact with poultry farms. Experts fear, however, that the flu virus could mutate into a form that is easily transmitted from human to human. If that happens, we may face the first influenza pandemic since the "Hong Kong Flu" killed 34,000 Americans (1968-1969).

This paper will briefly discuss the symptoms and clinical course of Avian Influenza in humans. The paper will then examine what measures employers may lawfully take if an employee falls ill or is exposed to the virus. In particular, the paper will discuss employers' obligations under the Family and Medical Leave Act of 1993 (FMLA), the California Family Rights Act (CFRA), the Americans With Disabilities Act (ADA), the California Fair Employment and Housing Act (FEHA), and the Confidentiality of Medical Information Act. This paper will also address how the responses of federal, state and local public health officials entities to a pandemic may limit or dictate what measures employers may implement in their response.

II. The Symptoms and Clinical Course of Avian Influenza in Humans

As of March 24, 2006, the World Health Organization (WHO) reported that there have been 186 confirmed human cases of Avian Influenza caused by the H5N1 virus. Of these confirmed cases, there have been 105 reported deaths — a 56% death rate. Thus far, human cases of Avian Influenza have only occurred in Azerbaijan, Cambodia, China, Indonesia, Iraq, Thailand, Turkey, and Vietnam. To date, Vietnam has recorded the highest number of confirmed

human cases (93) and deaths (42). WHO, *Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to WHO* http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_03_24/en/index.html (last visited Mar. 27, 2006).

Recent reports indicate that the virus has an incubation period of two to eight days, although some cases have shown an incubation period as long as 17 days. The Writing Committee of the World Health Organization (WHO) Consultation on Human Influenza A/H5, *Avian Influenza A (H5N1) Infection in Humans*, 353 New Eng. J. Med. 1374, 1377 (2005). Usually, the patient's initial symptoms include a high fever, lower respiratory track problems, and ordinary flu-like symptoms. *Id.* at 1378. Almost all patients develop pneumonia, and most patient deaths are caused by progressive respiratory failure. *Id.* Those individuals who died after contracting the virus usually did so within nine to ten days following the onset of the illness. *Id.* According to the WHO, in few reported cases, infected individuals displayed none of the respiratory symptoms usually associated with H5N1. Instead, they experienced fever, diarrhea or encephalitis.

III. Responding to an Influenza Pandemic

On December 6, 2005, the U.S. Department of Homeland Security, the U.S. Department of Commerce, and the U.S. Department of Health and Human Services issued a Pandemic Flu Business Letter. *Pandemic Flu Business Letter* http://pandemicflu.gov/plan/panbusletter.html (last visited Mar. 20, 2006). The letter urged businesses to educate themselves about the threat of pandemic flu and begin preparing their businesses to respond should a pandemic occur. The letter included a checklist issued by the Centers for Disease Control and Prevention (CDC) urging employers to take certain precautionary measures. *Business Pandemic Influenza Checklist* http://www.pandemicflu.gov/plan/pdf/businesschecklist.pdf (last updated Dec. 6,

2005). According to the CDC checklist, employers should "forecast and allow for employee absences during a pandemic due to factors such as personal illness . . . [and] community containment measures and quarantines." *Id.* Employers are further encouraged to "establish policies for employee compensation and sick-leave absences unique to a pandemic." *Id.*

With no reported U.S. cases of avian flu to date, few U.S. companies have drafted and put into place plans to respond to an outbreak of Avian Influenza. In a survey recently conducted by Watson Wyatt, only 15% of the U.S. businesses surveyed actually had plans in place to respond to an outbreak of avian flu. In comparison, 32% of businesses in the Asian-Pacific region reported having such plans already in place. A recent survey of 80 Southeast Asian corporate officials conducted by the American Chamber of Commerce found that nearly every company had someone in charge of avian flu policy and 60% had plans that could be implemented immediately to respond to a flu epidemic.

Although an avian flu outbreak does not appear eminent, employers would do will to begin formulating contingency plans to respond to such an outbreak. This paper will help employers identify what federal and state law requirements they must navigate to avoid running afoul of the rights and protections these laws afford employees.

To help employers grasp the various rights employees have, this paper will discuss the impact of these laws on three hypothetical employees:

1. Sally Shorttimer, who has been working for her employer for two months, became infected with the avian flu. Following a month-long battle with the flu, Sally recovers and advises her employer that she is ready to return to work.

2. Victor Veteran has been working for his employer for more than five years. Like Sally, he became infected with the avian flu and recovers after a month-long battle with the virus. He, too, is now ready to return to work.

3. Joe Quarantine did not become infected with the avian flu, nor did any members of his immediate family. Joe, however, lives in a neighborhood in which local public health officials have imposed a month-long, voluntary quarantine. The

voluntary quarantine was implemented after 50% of the residents within a three-mile radius became infected with the flu. Although ready, willing and able to work, Joe notified his employer that he would not be able to return to work until the quarantine had been lifted. At the conclusion of the quarantine period, Joe informed his employer that he was ready to return to work.

A. The FMLA and CFRA

The FMLA generally provides for up to 12 weeks of unpaid leave for an employee's own serious health condition that renders the employee unable to perform the functions of his or her job, or to care for a spouse, child or parent suffering from a serious health condition. 29 C.F.R. § 825.102. All private employers with 50 or more employees are "covered employers" under the FMLA. 29 U.S.C. § 2611(4); 29 C.F.R. § 825.104. To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months. The 12 months of employment need not have been consecutive. 29 C.F.R. § 825.110(b). Finally, to be eligible under the FMLA, an employee must have worked at least 1,250 hours (about 24 hours per week) over the previous 12-month period. 29 U.S.C. § 2611(2).

The federal regulations indicate that a "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either: 1) inpatient care at a hospital, hospice or residential medical care facility; or 2) continuing treatment by a health care provider. Continuing treatment by a health care provider constitutes a serious health condition in five circumstances:

- Any period of incapacity of more than three consecutive calendar days (and any subsequent treatment or period of incapacity relating to the same condition) that also involves treatment two or more times by a health care provider or treatment by a health care provider on one occasion that results in a regimen of continuing treatment under the supervision of a health care provider.
- Any period of incapacity due to pregnancy or for prenatal care.
- Any period of incapacity due to a chronic serious health condition. A chronic serious health condition is one that: 1) requires periodic visits or treatments by a health care provider; 2) continues over an extended period of time; and 3) may

cause episodic rather than a continuing period of incapacity (*e.g.*, epilepsy, diabetes, asthma, etc.).

- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective (*e.g.*, Alzheimer's, severe stroke or terminal stages of a disease).

- Any period of absence to receive multiple treatments (including any period of recovery there from) by a health care provider for restorative surgery or for a condition that would likely result in more than three consecutive days absence without medical intervention or treatment (*e.g.*, chemotherapy for cancer, physical therapy for severe arthritis, dialysis for kidney disease).

The CFRA is similar to the FMLA in most respects. Like the FMLA, the CFRA covers employers with 50 or more employees and allows an employee to take 12 week of unpaid leave if the employee has worked for the employer for one year and worked 1,250 hours in the past 12 months. The definition of a covered family member is somewhat broader under the CFRA. In addition to the family members named under the FMLA, the CFRA also includes a registered domestic partner in the definition of a covered family member for leave purposes. Also like the FMLA, the CFRA allows employers to require that an employee obtain a medical certification regarding serious health condition. Unlike the FMLA, however, the CFRA does not require disclosure of the precise condition that the employee is suffering from. Thus, an employee who takes leave pursuant to CFRA, rather than the FMLA, would not have to reveal the exact medical condition for which he or she was seeking leave.

Applying the FMLA and CFRA to our hypothetical employees, only Victor is likely to be protected under these laws. Because Victor has worked for his employer for more than five years, he is a covered employee under both the FMLA and CFRA. Given the documented cases of avian flu in humans, it is probable that Victor would have required inpatient care at a hospital or, at minimum, would have undergone continuing treatment from a healthcare provider. Thus, assuming Victor complied with the laws' notice requirements, his employer cannot penalize him

for the absences associated with his illness and would have to reinstate him to his former position once he was ready to return to work. However, under both the FMLA and the CFRA, an employer may require that an employee obtain fitness-for-duty certification before allowing him or her to return to work. Such a requirement should be applied to all employees returning from a medical leave of absence, not just those employees returning from FMLA or CFRA-protected leave.

Sally has not worked long enough to receive protection under either law. For other reasons, Joe would not be protected under either law. Since neither Joe nor a member of his family was infected with the avian flu, he cannot satisfy the "serious health condition" requirement. The mere fact that he was subject to a voluntary quarantine does not bring Joe within the protection of either law. Because Sally and Joe are not covered under either the federal or state leave law, their employers would not be prohibited from taking disciplinary action if, for example, the absences the employees incurred violated their employers' established attendance policies.

B. The ADA and the FEHA

Title I of the ADA prohibits employment discrimination against qualified individuals with disabilities with respect to hiring, compensation, promotion, termination, and other terms and conditions of employment. 42 U.S.C. §12101 *et seq.* The Title I of the ADA covers all employers with 15 or more employees. 42 U.S.C. §12111(5). The law contains no minimum period of employment requirement to be eligible for coverage.

The ADA defines "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. §12102(2)(A). "Disability" also includes a "record" of a physical or mental impairment that substantially limits one or more of the major life activities or "being regarded as having such an impairment." 42 U.S.C.

§§12102(2)(B), 12102(2)(C). Thus, there are three main categories of potential plaintiffs under the ADA: 1) a person with an actual disability; 2) a person with a record of a disability; or 3) a person who is "regarded as" disabled. Corrective or mitigating measures are considered in determining whether a person is disabled within the meaning of the ADA. Generally speaking, impairments of short-term duration tend not to meet the ADA's definition of a disability.

An employer may require an employee to produce certification from his or her health care provider to verify a claimed disability or the need for an accommodation is warranted. Additionally, an employer may ask an employee to respond to medical questions or submit to medical examinations that are job related and consistent with business necessity in the following situations: 1) where there is a question as to whether the employee can perform the essential functions of the job; 2) where the employer has a reasonable belief that the employee poses a "direct threat" to him or herself or others; and 3) where an accommodation has been requested and the need for it is not known or obvious.

The ADA requires employers to make reasonable accommodations for qualified applicants and employees with disabilities. 42 U.S.C. §12112(b)(5). Reasonable accommodations include:

> making existing facilities . . . readily accessible to and usable by individuals with disabilities . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. §12111(9). It is generally the applicant's or employee's responsibility to request an accommodation. Importantly, employers are not required to reassign essential job functions (*i.e.,* to relieve an applicant or employee of his or her responsibility for these functions). If an individual cannot perform essential job functions with or without a reasonable accommodation,

the individual would not be deemed "qualified" and would not be protected under the ADA. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 App., Section 1630.2(*o*) Reasonable Accommodation. Finally, an employer is not required under the ADA to provide an accommodation that would pose an "undue hardship" on its business. 42 U.S.C. §12112(b)(5)(A); 29 C.F.R. §§1630.9(a), 1630.15(d).

The FEHA covers employers with five or more employees. While the FEHA is in many respects similar to the ADA, it differs from the ADA in several notable ways. Where the ADA requires that a physical or mental impairment "substantially limits" one or more major life activity, under the FEHA the impairment need not be *substantially* limiting. Rather, the limitation need only make the "achievement of the major life activity *difficult*." (Emphasis added.) Additionally, the FEHA provides that limits to a major life activity shall be determined "without regard to mitigating measures such as medications, assistive devices . . . or reasonable accommodations, unless the mitigating measure itself limits a major life activity."

Turning to our hypothetical employees, it is not clear if the ADA and the FEHA would provide protection to these employees. Although both Sally and Victor were infected with avian flu, they were only incapacitated for a month. Unless they continued to experience some significant residual effects following their recovery (*e.g.* breathing difficulties, ability to care for oneself), they may have a difficult time establishing that they are suffering from a disability. If Sally and Victor were ill for a period of months — say six months to a year — there might be a stronger argument for finding that they meet the definition of a disability. Under that scenario, however, Sally and Victor still might have a difficult time satisfying the requirement that they were able to perform the essential functions of their job, with or without reasonable

accommodation. Given the reported crippling effects of avian flu, it does not seem likely that Victor or Sally would have been capable of working while they were symptomatic.

Assuming that Victor and Sally were able to satisfy the definition of a disability under either the ADA's or the FEHA's construction, under some circumstances a leave of absence may be regarded as a reasonable accommodation. The Equal Employment Opportunity Commission (EEOC) believes that an indefinite leave of absence can be a required form of accommodation unless the employer can show undue hardship. Most federal courts, though, generally have found that a lengthy leave of absence either renders an employee unqualified under the ADA or is patently unreasonable. *See, e.g., Bryne v. Avon Products, Inc.,* 328 F.3d 379 (7th Cir.), *cert. denied*, 540 U.S. 881 (2003) (multi-month leave of absence is not reasonable accommodation); *Wood v. Green,* 323 F.3d 1309 (11th Cir. 2003) (indefinite leave not required accommodation); *Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061 (10th Cir. 2001) (same). However, employers do not have to provide leave beyond that which is provided to other similarly situated employees.

Presumably, neither Victor or Sally would have requested a "prolonged" or "indefinite" leave. They both sought to return to work after a month-long absence. A court, given these compelling facts, might conclude that an accommodation in the form of a leave of absence is entirely reasonable. However, given the case law, the lengthier the leave request, the more likely a court would not conclude it is a reasonable accommodation, unless the employee could show that the employer would not suffer an undue hardship by letting the employee take such an extended leave of absence. If a court were to conclude that a month-long leave of absence was a reasonable accommodation, neither Sally nor Victor could be disciplined for taking the time off

from work, even if they did not have sufficient accrued paid leave to cover their absence from work.

While it appears that Sally and Victor may encounter significant difficulties in trying to prove they are disabled under the ADA or the FEHA, they, along with Joe, may be able to claim that their employer regarded them as disabled. Even under this theory, Sally and Victor would still have to show that they could perform the essential functions of their job with or without a reasonable accommodation. Sally and Victor would have a compelling argument that their employer regarded them as disabled if they were not permitted to return to work after making assurances to their employer that they had made a full recovery from the flu.

Similarly, Joe would be able to argue that he was regarded as disabled should his employer refuse to reinstate him following the conclusion of the quarantine period. Indeed, Joe's situation is analogous to that found in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987). There, the U.S. Supreme Court ruled that a school teacher who had latent tuberculosis (TB) was "handicapped" under the Rehabilitation Act. (The Rehabilitation Act predates the ADA and only applies to employers in the public sector; in practice, it has been given the same interpretation as the ADA.) The Court observed that "few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness." It went on to hold that a person who has no clinical symptoms but is discriminated against because of latent TB is nonetheless protected by the Rehabilitation Act/ADA. Thus, like the school teacher in *Arline*, Joe would likely be regarded as disabled by his employer because of his exposure to the avian flu and subsequent quarantine.

Even if Victor, Sally or Joe were able to prove that they had been regarded as disabled, their employers would not necessarily be required to accommodate them under the ADA or

FEHA. The federal circuits are currently split on whether an employer must accommodate an employee who is merely regarded as disabled. In a 2003 decision, the Ninth Circuit took the position that the reasonable accommodation requirement does not apply in cases where the employee is only regarded as disabled. *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir.), *cert. denied*, 540 U.S. 1049 (2003). The federal circuits are equally divided on the question, with the Fifth, Sixth and Eighth Circuit agreeing with the Ninth Circuit. The First, Third, Tenth and Eleventh Circuits have taken the contrary view. *See Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005); *D'Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005); *Williams v. Philadelphia Hous. Auth.*, 380 F.3d 751 (3d Cir. 2004); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999); *Workman v. Frito Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Katz v. City Metal Co.*, 87 F.3d 26, 32-34 (1st Cir. 1996).

The U.S. Supreme Court declined to resolve this issue in 2003 when it refused to grant certiorari in the *Kaplan* case. However, since that time three additional federal circuits have weighed in on the question, making it more likely that the Court may be ready to resolve the dispute the next time the matter goes up on appeal. Until such time the U.S. Supreme Court resolves the current conflict among the federal circuits, a California employer is not required to accommodate an employee it regards as disabled.[1]

[1] Although California employers are relieved under the ADA from having to accommodate an employee who is perceived to be disabled, in the event of a pandemic it would not be inconceivable that local public health officials would ask employers to utilize implement measures that would limit their employees' exposure to the flu virus while at the same time keeping their businesses in operation. This might mean that employers would be encouraged to permit all employees who are capable of performing their jobs from home to telecommute during an outbreak of avian flu or during a voluntary or mandatory quarantine.

While California employers have no duty to accommodate employees who are regarded as disabled, that does not leave Sally, Victor and Joe without any recourse under the ADA or the FEHA. They are still entitled to protection from discrimination based on their perceived disability and may also be protected from harassment in the workplace once back they return to work. Thus, their employers' refusal to reinstate Sally, Victor or Joe would be discriminatory unless it could be shown that the employers' refusal was based on some other nondiscriminatory reason.

While the Ninth Circuit has not addressed the question of whether the ADA recognizes a claim of harassment based on one's disability, the FEHA prohibits such forms of harassment. To be on the safe side, employers should have a workplace harassment policy in effect prohibiting all forms of harassment — be it sexual/gender-based, racial, age, disability, religious/ethnic — so that employees are on notice that harassment of any kind will not be tolerated. An employer should be careful not to treat an employee differently after returning from a bout of the avian flu — *e.g.*, move him or her to an isolated office, require that he or she wear a protective mask.

C. Privacy of Employee Medical Information

The privacy of employee medical records and information is addressed under the FMLA, the CFRA, the ADA and California's Confidentiality of Medical Information Act ("CMI") (Cal. Civil Code § 56.20 *et seq*.)

Under the FMLA and CFRA, confidentiality requirements apply to medical-related records "created for purposes" of the FMLA/CFRA, including medical certifications, recertifications or medical histories of employees or employees' family members. The confidentiality requirements under the FMLA/CFRA are stringent and parallel those of the ADA. Medical records must be kept in a file separate from an employee's personnel file and placed in a

locked cabinet. Only those individuals who have a true need to know about an employee's medical history should have access to an employee's medical records.

Similarly, under the ADA, employers must keep medical information it obtains from employees confidential, keep in a file separate from an employee's personnel file, and stored in a locked cabinet. Only those individuals with a true need to know this information should have access to it. The ADA, however, recognizes several exceptions to its confidentiality requirements:

1. Supervisors and managers may be told about necessary work restrictions or accommodations;

2. First aid and safety personnel may be told of a medical condition if the disability might require emergency treatment;

3. Government officials investigating compliance with the ADA must be given relevant information on request;

4. Employers may give medical information to state workers' compensation offices, workers' compensation insurance carriers, in accordance with workers' compensation laws; and

5. Employers may use information for insurance purposes.

Pursuant to EEOC guidance, employers should not disclose to a disabled employee's co-workers any medical information concerning the individual's disability or state whether it is providing the employee with a reasonable accommodation.

Under the CMI, an employer may not use or disclose medical information it has about an employee unless the employee has provided signed authorization to the employer. The state law provides several exceptions to the general confidentiality requirements. An employer may use or disclose an employee's medical information without the employee's signed authorization where:

1. Disclosure of the information is "compelled by judicial or administrative process or by any other specific provision of law";

2. The information is relevant in a lawsuit, arbitration, grievance or other claim in which the employer and employee are parties and the employee has placed his or her medical history in issue;

3. The information is used for the "purpose of administering and maintaining employee benefit plans"; or

4. The information may be disclosed to a health care provider to aid in the diagnosis or treatment of the employee where the employee is unable to authorize such disclosure.

Given the highly contagious and lethal nature of avian flu, federal and local public health officials could require employers to report which of its employees have been infected by the virus, as well as to notify those yet-to-be infected employees that they have been exposed to the virus, notwithstanding the above-referenced federal and state confidentiality requirements. Co-worker notification probably should be limited to informing an infected employee's co-workers that they have been exposed to the flu virus by an unnamed employee, unless the infected employee has given the employer permission to disclose his or her name.

The state's notification procedures for informing persons who have been exposed to HIV or AIDS is instructive. Under the law, a physician/surgeon may disclose the results of a positive HIV test to "a person reasonably believed to be a sexual partner or a person with whom the patient has shared the use of hypodermic needles" with or without the patient's consent, provided that no identifying information about the patient is disclosed. CA Health & Safety Code § 121015. The law also provides that prior to disclosing this information, a physician/surgeon must: 1) attempt to obtain the patient's consent to notify these persons, and 2) inform the patient of his or her intent to notify them.

D. The Propriety of Mandating Quarantine and Vaccination Measures

The implementation of a mandatory quarantine or forced inoculations has always been a touchy subject. During the 2002-2003 outbreak of the Severe Acute Respiratory Syndrome (SARS), some employers subjected employees returning from travel from SARS-infected areas

to either a mandatory or voluntary 10-day quarantine. In 2003, health care workers, in large numbers, balked at the federal government's recommendation that they be vaccinated for smallpox, in the event of a bioterrorist attack.

Although the implementation of a mandatory or voluntary quarantine is typically the province of federal (to prevent introduction from foreign countries or across state lines) and local public health authorities, pursuant to their police powers, the U.S. government did not impose a quarantine for persons who may have been exposed to the SARS virus while traveling abroad. The U.S. government did, however, add SARS to the list of diseases for which the federal government could have authorized a quarantine.[2]

Due to the limited outbreak of SARS in the U.S. (there were only 33 reported cases in the U.S. and no deaths) and where the virus was most likely to infect persons in large numbers (China, Hong Kong, Taiwan and Singapore), what U.S. employers might learn from their response to SARS that could aid them in developing an avian flu response plan is probably of nominal value. The WHO, in a recently updated draft protocol for responding to and containing a pandemic influenza, opined that the SARS experience suggests that quarantine is best applied on a voluntary basis and could be as effective as an enforced quarantine. The WHO went on to state that the implementation of a voluntary quarantine is also "consistent with modeling studies recommending the application of quarantine and other community-based measures as part of a containment strategy." WHO pandemic influenza draft protocol for rapid response and containment (updated draft March 17, 2006), WHO (draft protocol may be viewed on the WHO Web site at www.who.int/csr/disease/avian_influenza/guidelines/draftprotocol2006_03_17/en/.

[2] This list was most recently amended by presidential executive order on April 1, 2005, to include: "Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic." The most recent addition was made in response to concerns about a possible outbreak of avian flu.

If the avian flu ever became transmissible from human to human, there is a strong likelihood that federal or local public health officials would seek to quarantine individuals exposed to the virus, either on a mandatory or voluntary basis. Some speculate that a modern-day avian flu outbreak could rival the 1918 flu pandemic, which also started out as a bird flu and ended up killing more than 500,000 in the U.S. alone. Researchers have never discovered how the 1918 virus moved from infecting birds to humans. Gina Kolata, *The 1918 Flu Killed Millions. Does It Hold Clues for Today?*, N.Y. Times, Mar. 28, 2006, at D2.

Given that such measures are ordinarily undertaken by local public health officials, it is not altogether likely that employers would need to implement quarantine measures at the workplace. If, however, an employer did seek to quarantine employees that it knew had been exposed to the flu virus but did not show any signs of the illness, it may have to pay employees during the imposed quarantine period if they are ready, willing and able to work, so as not to run afoul of federal or state wage-hour laws. The same situation would arise if employees were subject to a quarantine ordered by local public health officials.

In the event of an avian flu outbreak, it is more likely that employers may be asked by local public health officials to institute a telecommuting policy for all employees who are capable of performing their job duties from home. Such a policy would apply to infected (assuming the employee is well enough to work), non-infected, and exposed employees. If large numbers of employees were permitted to work from home, such a policy, along with quarantine measures, could be instrumental in limiting how many individuals would be exposed to the virus.

As recent efforts to require that all military personnel be vaccinated against anthrax suggest, a mandatory avian flu vaccination program would not be without its detractors. Although at the present time there is no vaccination available to protect individuals from

contracting the avian flu virus, many believe that a vaccination would be the country's first line of defense against the spread of the virus, followed by antiviral drugs, which would only reduce the severity of the illness if administered within a day or two of the onset the symptoms. Denise Grady & Gina Kolata, *How Serious is the Risk?*, N.Y. Times, Mar. 28, 2006, at D1, 4.

The right to impose a mandatory vaccination program was first recognized by the U.S. Supreme Court just over a 100 years ago in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In a 7-2 ruling, the Court upheld a state's right to enact compulsory vaccination laws as a function of its police powers to protect the public's health. In so doing, the Court also established a four-pronged framework for balancing the rights of the individual against the state's right to protect the public's health:

> 1. Necessity: A state may not exercise its police powers in an arbitrary or unreasonable manner; it may only act in response to a demonstrable health threat.
>
> 2. Reasonable Means: There must be a reasonable relationship between the public health intervention and the public health concern being addressed; that is, the methods being used by the state must be designed to prevent or ameliorate the public health risk.
>
> 3. Proportionality: A public health regulation or policy is unconstitutional if the burden placed on the individual is wholly disproportionate to the expected benefit. In other words, there should be a reasonable balance between the public good to be achieved and the degree to which a individual's autonomy will be compromised.
>
> 4. Harm Avoidance: Public health actions should not pose a health risk to individuals.

Although the *Jacobson* case remains good law, state and local public health officials have not always moved to impose a mandatory vaccination program.

In the 1920s, for example, health officials generally opted for persuasive means to encourage individuals to get immunized for diphtheria. Only a handful of states made diphtheria immunization compulsory. Similarly, in the late 1950s, persuasive means were used by most health officials to encourage the public to obtain the polio vaccine, even in the face of an urgent

infectious disease threat. Only a minority of states passed laws requiring that children be vaccinated for polio prior to enrolling in school. However, during the later part of the 20th Century, states began to pass compulsory vaccination laws for children entering school. In 1968, about half of the states had laws on the books that required one or more vaccinations prior to entering school. By 1981, all 50 states had some kind of mandatory immunization law for school entry. James Colgrove & Ronald Bayer, *Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v. Massachusetts*, 95 Am. J. of Pub. Health 571, 573 (2005).

While primary responsibility for implementing voluntary or mandatory vaccination programs will rest with local public health officials, some employers — particularly those whose employees may be at much greater risk than the general public of becoming infected by the avian flu virus (e.g., the poultry processing industry) — may want to implement their own immunization program. There is court precedent both for and against an employer's implementation of a mandatory vaccination program.

In recent years the U.S. military has imposed mandatory vaccination programs for anthrax and smallpox. On the question of whether the military has a right to force its personnel to receive the anthrax vaccination, the results so far are mixed. In *Mazares v. Dep't of the Navy*, 302 F.3d 1382 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1748 (2003), the Federal Circuit upheld the military's right to terminate two civilian seamen who refused an order to be vaccinated against anthrax. In *Mazares*, the plaintiffs did not directly attack the propriety of the immunization program. Rather, they made the following arguments: 1) they should not be disciplined for refusing to be vaccinated because the vaccination order was "unauthorized" as

applied, given that they were non-emergency, essential civilian employees;[3] and 2) that the penalty imposed was excessive.

The appeals court found that the order did apply to the plaintiffs, notwithstanding the language in the order that seemed to exclude the plaintiffs from the mandatory immunization program. The appeals court explained that the order only laid out the department's "general policy" with respect to whom would be covered by the vaccination program and that there was ample authority in other regulations and directives issued by the Navy for it to require non-emergency essential civilian employees to receive the anthrax vaccine if the Navy determined "that such action is necessary and appropriate to protect the health of such employees." As for the penalty imposed, the court held that the plaintiffs' refusal to comply with the order was an act of insubordination that "interferes with and threatens the ability of the work force to perform its duties. Its adverse impact is particularly serious in the military, where prompt obedience to lawful orders is essential, especially aboard a ship." Thus, the court concluded that the penalty fit the offense.

In *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004), *modified*, 2005 U.S. Dist. LEXIS 55573 (D.D.C. Apr. 6, 2005),[4] the plaintiffs directly challenged the legality of the government's Anthrax Vaccination Immunization Program (AVIP) on the grounds that the vaccination had never been approved as a safe and effective drug for protection against inhalation anthrax. The

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[3] In the relevant order, it stated that the mandatory anthrax vaccine immunization program would apply to all "U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees and contractor personnel." The order ended with the following sentence: "Neither this policy nor the requirement to participate in [the vaccination program] is applicable to civilian employees or contractor personnel who are not designated as emergency essential." The plaintiffs claimed that they had never been designated as "emergency essential" employees.

[4] This matter is currently on appeal before the District of Columbia Court of Appeals.

district court agreed with the plaintiffs, finding that the vaccine was an "investigational drug" being used for an unapproved purpose in violation of federal law. Since the Congress has prohibited the administration of investigational drugs to service members without their consent, the court enjoined the military's involuntary AVIP. In a later ruling, the court modified its injunction to permit the military to administer the anthrax vaccine on a *voluntary* basis, only pursuant to a lawful Emergency Use Authorization.

In the private sector, the right of an employer to require that its employees be vaccinated is equally unsettled. In a recent ruling, *Virginia Mason Hosp. v. Washington State Nurses Ass'n*, 178 L.R.R.M. 2853 (W.D. Wash. Jan. 5, 2006), a federal district court upheld an arbitrator's award that found that an employer could not unilaterally implement a mandatory flu vaccination policy for registered nurses, pursuant to the terms of the parties' collective bargaining unit. The issue before the arbitrator was whether the vaccination program had been properly implemented; the propriety of the program was not in question. The federal court also held that the arbitrator's award did not violate public policy. The hospital failed to articulate an explicit and well-defined public policy that was violated by the award. It cited to no laws or legal precedent for the proposition that administering a flu vaccine should be mandatory in the health care industry.

Conversely, in *Frank v. Toledo Hosp.*, 62 FEP Cases 1665 (Ohio App. Dec. 30, 1992), the state appeals court upheld the employer's termination of an employee who refused to comply with her employer's mandatory rubella vaccination program. Like the previous case, the plaintiff did not directly challenge the employer's right to impose a mandatory vaccination program. Rather, the plaintiff argued that the employer's vaccination program was discriminatory as applied. The plaintiff refused to be vaccinated because she was pregnant and believed that the vaccination could harm the fetus. She was subsequently terminated in

accordance with the hospital's rubella vaccination policy. The plaintiff filed suit under Ohio's antidiscrimination law. The state appellate court held that the plaintiff failed to establish a prima facie case for sex discrimination. Although the appeals court acknowledged that the plaintiff could not receive the rubella vaccination because she was pregnant, it nevertheless concluded that her discharge was entirely unrelated to her pregnancy. Simply put, the plaintiff was discharged for violating the hospital's rubella vaccination policy.

These cases suggest is that while employers are not barred from adopting a mandatory vaccination program, depending on the work environment (*e.g.*, union vs. non-union, hospital vs. non-hospital settings, high risk vs. low risk settings), some employers will be able to make a more compelling argument for the implementation of such a program. A hospital or healthcare facility, for example, would have a more compelling argument for imposing forced immunizations than say an accounting or marketing firm. Certainly, in the union context, an employer will not likely be able to implement such a policy on a unilateral basis without being hit with an unfair labor practice charge. If the vaccination is known to pose health risks for certain members of the population, a court may be hesitant to enforce the policy against individuals who can show that the risks of being vaccinated would far outweigh its benefits.

Employers could make a mandatory vaccination policy more acceptable by exempting certain employees for religious[5] or legitimate medical reasons (*e.g.*, chronic illnesses, pregnancy) without subjecting them to an adverse employment action. Finally, employers would need to

[5] Under California's Tuberculosis (TB) control law, persons infected with TB are exempt from examination, inspection and treatment (provided that they can be safely quarantined or isolated) if they depend "exclusively on prayer for healing in accordance with the teachings of any *well recognized* religious sect, denomination, or organization and claims exemption on that ground." (Emphasis added.) Cal. Health & Safety Code § 121370.

decide ahead of time if an employee's refusal (absent good cause) to comply with the program will be grounds for termination.

Clearly, any decision to impose a mandatory vaccination program should be made after careful consideration, with the employer weighing all the benefits and disadvantages.

E. Cal/OSHA and OSHA

To date, Cal/OSHA has yet to implement any airborne infectious disease standards for employers. The agency is currently in the process of drafting such standards. These standards, however, will only apply to certain employers: healthcare facilities, homeless shelters, and police and fire.[6]

Under federal OSHA, the "General Duty" clause requires an employer to eliminate "recognized" hazards that have serious potential for death or injury not addressed by a specific or performance standard to the extent there may be feasibly useful means of doing so. Going back to the example of the employer whose business involves the processing of uncooked poultry products, given what is currently known about the avian flu virus, such an employer may have a present duty under this clause to develop procedures that will reduce an employee's risk of exposure to avian flu (*e.g.*, require that employees wear additional safety gear), monitor employees for the symptoms associated with the virus and, where appropriate, require that employees be tested for avian flu. State health departments and some research laboratories currently can perform genetic testing for the avian flu virus but only on a small scale. Test results are available within a few hours. Denise Grady & Gina Kolata, *How Serious is the Risk?*, N.Y. Times, Mar. 28, 2006, at D1, 4. Employer procedures should also specify how long an

[6] The California Department of Health Services has drafted a pandemic influenza preparedness and response plan. That plan can be viewed at http://www.dhs.ca.gov/ps/dcdc/pdf/DRAFT520Pandemic%20Influenza%20Plan%201-1806.pdf.

infected employee must remain off on sick leave before he or she is authorized to return to work and what kind of medical documentation will be required from the employee before s/he will be permitted to return.

IV. Conclusion

Although most U.S. employers have yet to develop a plan of operation to respond to a potential flu pandemic, the problems associated with such a public health crisis are both multifaceted and complicated. As this article suggests, it is not entirely clear how employers should (or will be expected) respond if a pandemic occurs. While employers must be mindful of employees' rights under federal and state law, the more difficult question is whether employers will need to take extraordinary measures to keep their businesses afloat and protect their employees from unnecessary exposure to the flu virus.

Because the last flu epidemic of any significance occurred more than 30 years ago, employers will have to draw on their collective wisdom — and possibly look to what some of their Southeast Asian counterparts have already devised (relying on their experience with SARS) — to adopt procedures that are sound and well reasoned. With the experts warning that the next flu outbreak could result in significant loss of life, employers simply cannot afford to shirk their corporate responsibility and bury their collective heads in the sand.